

Khakpour (Migration) [2023] AATA 4366 (29 December 2023)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Mohammad Ali Khakpour
REPRESENTATIVE:	Mr Lorenzo Boccabella
CASE NUMBER:	2209091
HOME AFFAIRS REFERENCE(S):	BCC2016/2356188
MEMBER:	Andrew McLean Williams
DATE:	29 December 2023
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the Applicant meets the following criteria for a Subclass 820 (Spouse) visa: • Public Interest Criterion 4020 for the purposes of cl 820.226 of Schedule 2 to the Regulations

Statement made on 29 December 2023 at 4:28pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Federal Court remittal – misleading information in a previous visa application – bogus degree certificate and transcripts – compassionate or compelling circumstances – separation from long term Australian citizen de-facto partner – plans to commence family – emotional and financial hardship to the sponsor – decision under review remitted

LEGISLATION

Migration Act 1958, ss 48, 65

Migration Regulations 1994, r 1.03; Schedule 2, cl 820.226; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a Delegate of the Minister for Immigration and Border Protection on 17 October 2017 to refuse to grant the Applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (Cth) ('the Act').
4. The Applicant applied for the visa on 13 July 2016. The Delegate refused to grant the visa on the basis that the Applicant did not satisfy the requirements of clause 820.226 of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Regulations') because the Applicant had provided a bogus document and information that was false and misleading in a material particular in relation to his earlier Temporary Work (Skilled) UC-457 visa application, and that there were no compelling circumstances affecting either the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian permanent resident to justify a waiver of public interest criteria 4020.
5. This matter comes before the Tribunal for a second time in consequence of an order made by Greenwood J in the Federal Court of Australia setting aside orders of the Federal Circuit Court of Australia made on 28 May 2020 which had affirmed the earlier decision of the Tribunal that had affirmed the original decision of the Delegate to refuse the Applicant a partner visa. Greenwood J ordered that the matter be remitted to the Tribunal to be determined according to law.
6. The Applicant appeared before the Tribunal on 21 December 2023 to give evidence. Evidence was also received at the hearing from the Applicant's de-facto partner Dr Aramesh Tavakoli, an Australian citizen and permanent resident who is also the Applicant's sponsor for the visa.
7. The Applicant was represented in relation to this review by Mr Lorenzo Boccabella, of Counsel. Mr Boccabella attended the Tribunal hearing on 21 December 2023, and provided detailed written submissions to the Tribunal prior to the hearing. These had been received by the Tribunal on 12 December 2023.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant ('the Applicant') meets Public Interest Criterion 4020 ('PIC 4020') as required by clause 820.226 for the grant of the visa. Broadly speaking, this requires that:
 - there be no evidence that the Applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a 'bogus document' or information that is false or misleading in a material particular in relation to the application for the visa, or a visa that the Applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the Applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the Applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the Applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the Applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the Applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is now extracted in the **attachment** to this decision.

Has the Applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the **attachment** to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of 'bogus document' to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the Applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the Applicant either knowingly, or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the Applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. The Applicant originally arrived in Australia on 28 November 2014 as the holder of a Temporary Work Skilled (Subclass 457) visa.
15. As part of applying for the Subclass 457 visa, the Applicant had provided a translation and copy of a degree certificate for a Bachelor of Computer Software Engineering from the Islamic Azad University, as well as a translation and copy of transcripts for that degree for the academic years 1998 – 2003, inclusive.
16. Subsequently, investigations undertaken by the Department revealed that the Applicant had not completed the requirements for that degree, and that the degree certificate and academic transcripts were 'bogus' documents. The results of those Departmental enquiries were subsequently put to the Applicant, whereupon he readily admitted that although he had completed a significant component of those studies he had not actually completed the degree, such that the degree certificate and transcripts were bogus. The Applicant acknowledged that his conduct was wrong and foolish, however the Applicant expressed that he had been motivated at the time by his desire to ensure that he would qualify for a subclass 457 Visa. It is a matter of no small irony to observe that, on the basis of his skills and experience and other (non-impugned) academic qualifications, the Applicant would have

easily qualified for a subclass 457 Visa, without the need to further embellish those prospects via the bogus documents.

17. During the Tribunal hearing, the Applicant maintained his admission regarding the provision of bogus documents in support of his Subclass 457 visa application. In light of same, the Tribunal is satisfied that the Applicant has provided information that is false or misleading in a material particular, as defined in PIC 4020 (5), in relation to a visa held by the Applicant in the 12 months before the partner visa application was made. Therefore, the Applicant does not meet PIC 4020 (1).

Should the requirements of PIC 4020(1) or (2) now be waived?

18. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
19. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
20. For the following reasons, the Tribunal is now satisfied that the requirements should be waived on the basis that there are compassionate circumstances affecting the interests of the Applicant's de-facto partner Dr Aramesh Tavakoli, who is an Australian citizen.
21. The Applicant has been in a continuous de-facto relationship in Australia with Dr Aramesh Tavakoli since May 2016. They first met in Australia in April 2015.
22. Dr Tavakoli - who was herself born in Iran in 1983 - was granted a student visa to complete a PHD at QUT on a full scholarship in July 2012 and completed her PHD at that Institution in September 2017. Dr Tavakoli became an Australian permanent resident on 21 December 2015 and was granted Australian citizenship on 28 August 2017. Dr Tavakoli now works in Australia as a biomedical engineer.
23. The Applicant is barred by reason of s.48 of the *Migration Act* from applying for the visa from onshore in Australia. In the event that the Applicant were to be required to return to Iran in order to apply for a Subclass 309 visa (the offshore analogue of the Subclass 820 visa) the likely processing time would entail a wait of up to 23 months. Because of that, the Applicant and Dr Tavakoli would be forced to live apart, with the Applicant returning to Iran and Dr Tavakoli remaining in Australia in her paid employment.
24. In her statutory declaration Dr Tavakoli states, in part:
 25. 5. *At the risk of oversimplification, Mohammed is the love of my life, we have been living together as husband and wife now for over eight years.*
 26. 6. *I cannot see myself separating from him for any length of time.*
 27. .../

28. 25. *I just could not possibly risk going to Iran for anything more than a few weeks.*
29. 26. *If Mohammed were not granted this visa (the subclass 820) we would be separated for however long it took for his offshore subclass 309 Visa to be processed.*
30. 27. *I would be totally miserable over that period, being alone here in Brisbane.*
31. 28. *As stated, the only time we have been apart is the short periods I have gone to Iran.*
32. 29. *The hold-up with the visa grant has caused considerable problems to us. Being on a bridging visa E, Mohammed has no work rights, and also cannot be a co-signatory to a mortgage. We would also have to pay higher transaction taxes because Mohammed is not a permanent resident.*
33. 30. *Until he gets a stable visa it is impossible to think about purchasing a house or unit together.*

34. During the giving of her oral evidence before the Tribunal Dr Tavakoli further explained that for financial reasons it would not be possible for her to resign her position in Australia in order to return to Iran to be with her partner and, as an employee, she would only be able to return to Iran to visit her partner for very short periods. Even then, under Iranian law Dr Tavakoli's de facto relationship with the Applicant is an unlawful relationship, such that it would be both difficult and ill-advised for them to risk being seen together in public in Iran, thereby running the risk of being reported to the Iranian authorities.
35. Dr Tavakoli also told the Tribunal that, as a 40-year-old woman she is now anxious to start a family with the Applicant, yet had thus far delayed having children because of the ongoing uncertainty regarding the Applicant's visa. In the event that the Applicant is required to now apply for a partner visa from offshore in Iran this will only add further delay to Dr Tavakoli's plans to have children and thus further diminish her prospects in that regard.
36. Current 'Smart traveller' travel advice given to Australian citizens by the Department of Foreign Affairs and Trade (updated on 24 November 2023) is that Australian citizens should *not* travel to Iran. This is an important factor now weighing in support of a favourable exercise of the discretion.
37. The Tribunal accepts the evidence given by Dr Tavakoli as being entirely genuine, and records feelings of sympathy for the circumstances of emotional distress that would be imposed on Dr Tavakoli in the event that PIC 4020(1) were not to be waived.
38. Therefore the Tribunal considers that the requirements of PIC 4020(1) should be waived.

Has the Applicant satisfied the identity requirements?

39. PIC 4020(2A) requires an Applicant satisfy the Tribunal as to his or her identity. The Tribunal has considered the biodata information from the Applicant's Iranian passport and is now satisfied regarding his identity. Therefore, the Applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

40. PIC 4020(2B) requires that neither the Applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the

visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

41. There is no information before the Tribunal indicating that either the Applicant or any other family unit member has been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa was originally refused. Therefore PIC 4020(2B) is met.
42. On the basis of the above, the Applicant does satisfy PIC 4020 for the purposes of clause 820.226.

DECISION

43. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the Applicant meets the following criteria for a Subclass 820 (Spouse) visa:
 44.
 - Public Interest Criterion 4020 for the purposes of cl 820.226 of Schedule 2 to the Regulations

Andrew McLean Williams
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...